IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6008 of 1994 with
CIVIL APPLICATION NO. 5622/97 & MCA NO. 454/97

For Approval and Signature:

HON'BLE MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

GURJARGRUVERS PVT. LTD.

Versus

AKBARKHAN HAVALDARKHAN

Appearance:

1. Special Civil Application No. 6008 of 1994

Mr. K.M. Thakkar for M/S TRIVEDI & GUPTA for Petitioner No. 1

MR DG CHAUHAN for Respondent No. 1-3

CORAM : HON'BLE MR.JUSTICE H.K.RATHOD

Date of decision: 20/01/2004

ORAL JUDGEMENT

Heard learned advocate Mr. Thakar for the petitioner and Mr. D.G. Chauhan, learned advocate who

is appearing for the respondent workman. By means of this petition under Article 227 of the Constitution of India, the petitioner has challenged the legality, validity and propriety of the award dated 24.8.1993 made by the labour court wherein the labour court has set aside the order of termination dated 10th November, 1984 and granted reinstatement in service with 50 per cent of the back wages for the intervening period with continuity of service and other consequential benefits. On 4th October, 1994, while admitting the petition, this court has granted interim relief in terms of para 5(B) of the petition. Alongwith the petition, the petitioner has produced copy of the statement of claim, written statement, oral evidence of the parties, written arguments, seniority list and award. Learned advocate Mr. Thakar has read over entire award before this Court and he submits that the labour court has committed gross error in passing such an award against the petitioner; that the work has been reduced in the tracing department and, therefore, these three workmen were offered alternative work in the new project department by passing order dated 11th October, 1984 and the workmen concerned ought to have reported for duty on 15th October, 1984 but the workmen after receiving the order of transfer, refused to work in the new project department and, therefore, by letter dated 9th November, 1984, services of said three workmen were terminated with effect from 10th November, 1984 by the petitioner. He also submitted that the provisions of section 25-Fof the ID Act, 1947 were complied with by the petitioner at the time of terminating the services of the said three workmen. It was his submission that in their statement of claim, the workmen had not raised the contention about the breach of the provisions of section 25-G of the ID Act, 1947 and that is how, the petitioner has not been able to give any answer and could not produce any material to satisfy the requirement of section 25-G of the ID Act, 1947 and, therefore, the conclusion of the labour court on the issue that the provisions of section 25-G of the ID Act, 1947 have been violated is the basic error which is required to be corrected by this court. He read over entire deposition of all three workmen and evidence of the witness for the petitioner and emphasized the contradictory statements made by the workmen in their examination in chief as well as the cross examination and submitted that looking to the conduct of the workmen, at one point of time, it was said by them that the order of transfer is not received and subsequently, they are saying that the order of transfer has been received by them and they refused to work on the new project department. Therefore, under such circumstances, no

relief can be granted in favour of the workmen who had made contradictory statements before the labour court. He also submitted that if the contention about the breach of sec. 25-G of the ID Act, 1947 would have been raised by the workmen concerned, then, the petitioner would have got an opportunity to satisfy the labour court concerned that there is no violation of the provisions of the said section by producing necessary material in that regard. According to him, since that contention was not raised, the petitioner has not been able to produce material in that regard. He also submitted that the labour court has committed error in coming to the conclusion that such termination is amounting to punishment. According to him, in fact, there is no punishment imposed by the petitioner. According to him, this was not the case of the petitioner before the labour court. He also read over the averments made by the workmen in their statement of claim. In short, it is his contention that the labour court has erred in concluding that the impugned order of termination is punitive. It is also his submission that the labour court has erred in concluding that the petitioner has committed breach of section 25-G of the ID Act, 1947. It is, therefore, his submission that the labour court ought not to have made the award of reinstatement. He submitted that after the award was made by the labour court, offer was made by the petitioner without prejudice to the rights and contentions of the workmen to resume the duties but the respondents have not resumed the duties. According to him, these are the subsequent development which are required to be considered by this Court while examining the award made by the labour Court. This statement made by Mr. Thakar was objected by Mr. Chauhan by submitting that the workmen were ready to resume the duties in response to the offer made by the petitioner but when they had in fact gone for reporting, they were prevented at the Gate of the premises. However, this court is such alleged development, disputed by the other side and is examining the award made by the labour court on the basis of the evidence on record.

This court has to consider as to whether the award made by the labour court is within its jurisdiction and competence or not. While this court was dictating the oral judgment in the open court, in the midst of the dictation, learned advocate for the petitioner also made a submission after obtaining leave of this Court that the tracing department has been closed since 1987. As regards this contention about the closure of the tracing department in the year 1987, this Court asked one question to the learned advocate for the petitioner as to

whether any such contention has been raised by the petitioner before the labour court or not at the relevant point of time; whether any assertion in that regard has been made by the petitioner or its witness while the evidence was recorded before the labour court or not and whether such contention was raised by it during the course of arguments or not. After consuming about ten minutes and verifying the record, learned advocate for the petitioner clearly submitted that no such contention has been raised by the petitioner in its pleadings before the labour court, no such whisper has been made by its witness in his evidence before the labour court and it was not submitted even during the course of arguments before the labour court. In view of such clear answer, this contention raised for the first time before this court has to be ignored. Same is, therefore, ignored by this Court. Learned advocate Mr. Chauhan has submitted that the deposition of the witness for the petitioner was recorded before the labour court on 23rd December, 1991 wherein it was admitted by him that at the time of termination of the present workmen, 80 workmen were working with the company and today also, 80 workmen are still working with the company. In respect of that contention of Mr. Chauhan, learned advocate Mr. Krishnan for the petitioner has clarified that they are working in the new project department and in view of that clarification made by Mr. Krishnan, it was further clarified by Mr. Chauhan that in the oral evidence of the witness for the petitioner, this has not been clarified but it was simply said that today also, 80 workmen are working with the petitioner company. Except these submissions, no other submissions were made by the learned advocate appearing for the petitioner. No decision has been cited by the learned advocate for the petitioner for consideration of this Court. As regards grant of 50 per cent back wages for the intervening period, no submission has been made by the learned advocate for the petitioner.

While supporting the award made by the labour court, learned advocate Mr. Chauhan submitted that the the order of termination passed by the employer was violative of section 25-G of the ID Act, 1947 and rule 81 of the ID (Gujarat) Rules, 1966. He also submitted that this order was passed by the employer only on the ground that the workmen were not prepared to work in the new project department and that is how the order has been passed only against the present three workmen and excepting the present workmen, no other workmen were retrenched by the employer and therefore, it was amounting to punishment by the employer without following

the procedure according to law and, therefore, labour court was right in holding that it was violative of sec.25-G of the ID Act read with rule 81 of the Rules framed under the said Act. He also submitted that the labour court was right in appreciating the evidence on record produced by the parties.According to him, before the labour court, no documentary evidence has been produced by the petitioner to justify the reduction in work in tracing department and, therefore, the conclusions drawn by the labour court on the basis of the evidence on record are just and proper and the same would not require any interference of this court. According to him, unless it is successfully established by the petitioner that the labour court has committed any jurisdictional error and/or any procedural irregularity or that the findings given by the labour court are contrary to the facts on record or that such findings are perverse, this court cannot interfere with such findings of fact while exercising the powers under Article 227 of the Constitution of India.

I have considered the submissions made by the learned advocates for the parties. I have perused the award made by the labour court as well as the statement of claim filed by the workmen and the written statement thereto filed by the petitioner company before the labour Court. I have also perused the evidence of three workmen concerned and the evidence of the witness for the petitioner as well as the written submissions which were made by the learned advocates for the parties before the labour court. On 1st October, 1984, transfer order was passed by the petitioner against these three workmen asking them to work in the New Project Department. This order of transfer was objected by these three workmen concerned. Immediately within one month therefrom, an order of termination has been passed by the petitioner under the guise that the work has been reduced in the tracing department. For justifying the action of because of the reduction of work in the tracing department, the petitioner has produced no material before the labour court to show that the transfer of these three workmen was necessary and no other workmen were required to be transferred. Looking to the evidence of the workmen, there was some union rivalry being the basis of such termination. Looking to the evidence of the witness for the petitioner, it appears that there was some union rivalry indirectly suggested, to some extent, admitted by the witness for the petitioner. If the non-implementation of the order of transfer is considered as disobedience on the part of the workmen concerned, then, for that, they have to follow the procedure before

passing such order but without following such procedure, services of the workmen concerned were terminated. It is very easy way to terminate the services while following the mandate of section 25-F of the ID Act, 1947 by serving one month's notice or notice pay in lieu thereof and by paying retrenchment compensation. According to my opinion, section 25-F of the ID Act, 1947 has not been enacted with a view to give license to the employer to terminate the services of the workmen for any reason and without any justification. According to my opinion, it is the duty on the part of the employer to show strict compliance of section 25-F of the ID Act, 1947 and to justify the order of termination before the labour court. Even if there is compliance of section 25-F of the ID Act, 1947 in letter and spirit but if the employer is unable to justify the order of termination, then,the Court has to interfere with such unjustified order of termination and to pass appropriate orders. As per this Court's opinion, section 25-F of the ID Act, 1947 is not the only section which is required to be complied with by the employer. Section 25-F of the ID Act, 1947 is attached with section 25-G of the Act and Rule 81 of the ID (Gujarat) Rules, 1966. These are the combined provisions. If the order of termination is in consonance with these provisions namely sec. 25-F, Sec.25-G and Rule 81 of the Rules, then, such termination would become legal termination and not otherwise. If the order of termination is not in consonance with these provisions namely sec. 25-F, Sec.25-G and Rule 81 of the Rules, then, it would render such order illegal and bad in law. In view of that,the contention raised by Mr. Thakar that they have strictly complied with the mandate of sec. 25-F of the ID Act and as no such contention about breach of section 25-G was raised by the workmen, they were unable to produce material and, therefore, findings of the labour court as regards breach of sec. 25-G are unwarranted cannot be accepted simply on the ground that it is the burden upon he employer to satisfy that they have followed section 25-G and this court is of the clear opinion that it is not necessary for the workmen to raise such contention about breach of sec. 25-G of the ID Act, 1947. Once it is proved by the employer that there is compliance of sec. 25-F of the ID Act, 1947, then, it is becoming his duty to justify the termination. The question of justification of termination would become irrelevant once it is proved that the order is bad for want of compliance of sec. 25-F. For appreciating this aspect of the matter, section 25-G of the ID Act, 1947 is required to be appreciated. Same is, therefore, reproduced as under:

"25-G. Procedure for retrenchment.- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman, who was the last person to be employed in that category, unless for reasons to be recorded by the employer retrenches any other workman."

Thus, bare perusal of section 25-G of the ID Act, 1947 itself suggests that it is the duty of the employer to comply with sec. 25-G when they are retrenching any employee. Therefore, there is no need on the part of the workman concerned to raise such contention but it is the legal obligation on the part of the employer to satisfy it before the Court where the termination has been challenged by the workman. Therefore, the labour court was right in coming to the conclusion that there was breach of section 25-G of the ID Act and the petitioner has not justified and satisfied the labour court about compliance of section 25-G of the ID Act, 1947. This Court is of the clear opinion that once the action of termination is challenged by the workman before the labour court or the industrial tribunal, then, it is the duty of the employer to establish that the order of termination is legal and valid on all counts. Like sec. 25-G of the ID Act, 1947, rule 81 of the ID (Gujarat) Rules is also mandatory and is required to be appreciated. Same is, therefore, reproduced as under:

"81. Maintenance of seniority list of Workmen.(1) The employer shall prepare a list of all workmen in the particular category from which retrenchment is contemplated arranged according to the seniority of their service in that category and cause a copy thereof tobe posted on a Notice Board in conspicuous place in the premises of the industrial establishment at least seven days before the actual date of retrenchment."

Thus,bare perusal of rule 81 of the said Rules makes it clear that in case when the occasion for retrenchment arise, it is the duty of the employer to publish the seniority list of the employee working in category where the retrenchment is necessary. This rule has also been held to be mandatory and non compliance thereof renders termination bad. Therefore, according to

my opinion, if the employer has to prove legal termination or retrenchment, then, he is required to satisfy section 25F of the ID Act and then, to satisfy the Court about the compliance of sec. 25G and rule 81 of the ID Act, 1947. If either of the section and rule is not complied with by the employer, according to my opinion, order of termination would become bad in law and void ab initio. All these sections including rule 81 are mandatory in nature. Therefore, considering these mandatory statutory provisions in light of the facts and the observations made by the labour court, according to my opinion, the labour court was right in coming to the conclusion that there was breach of section 25-G and rule 81 of the said Rules and such findings are legal and valid and labour court has not committed any error in recording such findings.

From the evidence of the witness for the petitioner before the labour court, it appears that at the time of termination of these three workmen, in all 80 workmen were working and at the time when the deposition was given by the witness for the petitioner namely 23.12.1991, 80 workmen were working and if that evidence of the witness for the petitioner is correct, then, how the work has been reduced in tracing department and to what extent, the work has been reduced requiring retrenchment or termination of only three workmen? This shows mala fide on the part of the petitioner, means, it is not fair action on the part of the petitioner. Therefore, even in case of retrenchment, employer has to follow sec. 25F, 25G and rule 81 of the Rules as stated above and to justify its action and non compliance of these provisions, even in case of retrenchment also, would render such retrenchment as illegal and bad in law and void ab initio. Therefore, considering the evidence on the record and the observations made by the labour court, according to my opinion, the petitioner was not justified in terminating the services of three workmen.

Though it was contended by the learned advocate for the petitioner that as the contention about violation of section 25-G was not raised by the workmen before the labour court, they were unable to produce any material in that regard, and, therefore, the petitioner was unable to satisfy the labour court in that regard, before this court also, the petitioner has not produced any material for perusal of this court to examine as to whether the petitioner has complied with the mandate of sec. 25G and rule 81 of the Rules or not. This aspect is also

required to be kept in view while examining the legality of the award. Therefore, according to my opinion, the award made by the labour court is perfectly all right requiring no interference of this court.

No submissions were made by the learned advocate for the petitioner about the award of 50 per cent of the back wages made by the labour court while granting reinstatement in favour of the workmen. Before the labour court, the petitioner has not produced any evidence to establish that the workmen were working during the intervening period and were earning and, therefore, back wages should not be granted and nothing has been submitted in that regard before this Court also. Therefore, looking to the observations made by the labour court in para 10, the labour court has, after considering the evidence on record as regards back wages, refrained itself from granting full back wages but has granted only 50 per cent back wages for the intervening period and was right in granting back wages only to the extent of 50 per cent considering the evidence on record. Therefore, that part of the award is also just and proper and would not require any interference of this court while exercising extra ordinary powers under Article 227 of the Constitution of India.

Recently, the Apex Court has considered the scope of Article 227 of the Constitution of India in case of SYED T.A. NAQSHBANDI AND OTHERS V. STATE OF JAMMU & KASHMIR AND OTHERS reported in [2003] 9 SCC 592. The observations made by the apex court in Head Note [H] are reproduced as under:

"Judicial review is permissible only to the extent of finding whether the process in reaching the decision has been observed correctly and not the decision itself, as such. Critical or independent analysis or appraisal of the material by the Courts exercising powers of judicial review unlike the case of an appellate court, would neither be permissible nor conducive to the interests of either the officers concerned or the system and institutions. Grievances must be sufficiently substantiated to have firm or concrete basis on properly established facts and further proved to be well justified in law, for being countenanced by the court in exercise of its powers of judicial review. Unless the exercise of power is shown to violate any other

provision of the Constitution of India or any of the existing statutory rules, the same cannot be challenged by making it a justiciable issue before Courts."

Therefore, considering the entire evidence on record and since learned advocate for the petitioner has not been able to point out that the findings given by the labour court are contrary to the evidence on record or perverse or that the labour court has committed any jurisdictional error and/or procedural irregularity, according to my opinion, the labour court was right in granting reinstatement with 50 per cent of the back wages for the intervening period. Therefore, there is no substance in the petition and the same is, therefore, required to be dismissed.

In the result, this petition is dismissed. Rule is discharged. Interim relief shall stand vacated. There shall be no order as to costs.

In view of this order passed by this Court in the main matter, Civil Application NO. 5622 of 1997 as well as the Misc. Civil Application No. 454 of 1997 in Civil Application NO. 9065 of 1996 shall also disposed of with no order as to costs.

(H.K. Rathod,J.)

Vyas